

# RACE AND SENTENCING

IN WISCONSIN CRIMINAL COURTS —  
A PRELIMINARY INQUIRY



By Hon. Patience Drake Roggensack

The disparity between the percentage of African Americans incarcerated in Wisconsin prisons and the percentage of African Americans in Wisconsin's population has caused some to suggest that racial disparity may be caused by racial bias in Wisconsin courts.<sup>1</sup> Because of this suggestion, we began to study whether being African American had an adverse effect on sentences imposed for criminal convictions. As explained below, with some research and other assistance (hence the term "we"), we developed a protocol to statistically analyze sentencing in Wisconsin; we promoted the adoption of a uniform personal identification number, the state ID (SID), to enable tracking convicted persons in the courts and in the Department of Corrections (DOC); we created mathematically proportional severity weights for felony and misdemeanor classes; we conducted preliminary statistical analyses showing for some felony classes African-American males plead guilty less frequently than Caucasian males; and we concluded that African-American males are not disproportionately represented in Wisconsin prisons because of drug-offense convictions.

However, due to lack of staff and other resources, we could not complete statistical analyses of race and sentencing in Wisconsin courts.<sup>2</sup> I write to explain what we did and why, and to encourage those who have resources necessary for statistically analyzing sentencing in Wisconsin courts to complete the work we only began.

## Our Study

Because of the enormity of the task of comparing all facets of sentencing that could be affected by race, we limited our study to attempting to analyze statistically whether similarly situated African-American and Caucasian male defendants were sentenced similarly.<sup>3</sup> This goal was simple to state and amazingly complex to achieve.

Throughout our efforts, staff of Wisconsin's Consolidated Court Automation Programs (CCAP), led by Jean Bousquet, worked closely with statistician Nicholas Keuler, my law clerks,<sup>4</sup> and me. CCAP's

database contained information helpful to our study, and DOC's database contained additional useful information.<sup>5</sup> As I will explain below, neither database contains all of the information necessary to make sentencing truly transparent or to provide sufficient data for comprehensive statistical analyses of sentencing practices. However, because both databases contained useful data, we decided to combine them to permit us to track defendants from conviction through incarceration, in the hope that we could then determine whether race played a role in sentencing African-American men. Combining two databases may sound like an easy task, but it was not. For example, simply identifying when we were reviewing the sentencing history of the same person was problematic because DOC's database identified inmates by DOC number and CCAP's database identified defendants by case number and, to some extent, by name.

During the course of our combined efforts in studying race and sentencing, CCAP began to consider using a common personal identifier in conjunction with DOC. With CCAP and DOC having a common personal identifying number, an individual defendant could be tracked from conviction throughout his term of incarceration.

Today I am happy to report that CCAP and DOC do have a common identifier, known as the state ID or SID.<sup>6</sup> And, although this funding is not yet in place, the statewide Criminal Justice Coordinating Council's data subcommittee has sought a federal grant to establish a standard SID for defendants across the criminal



Patience Drake Roggensack is the chief justice of the Wisconsin Supreme Court. She has served as a member of the court since 2003.

justice system. The Wisconsin Department of Justice (DOJ) issues a unique SID to each defendant booked in jails and prisons and shares this identifier with DOC for inmates. SID links are being created between DOJ and the district attorneys' statewide case management system, which will be shared with CCAP. Once work in all of those systems is complete, we will be able to track a defendant from arrest through incarceration because defendants in the CCAP system will be connected with DOJ, DOC, and the district attorneys' statewide case management system via SID. This will be a huge improvement for following defendants in Wisconsin's criminal justice system from charging through all that may follow. It will help us determine how defendants enter the system and what results from being charged with a crime.

As I spoke with those interested in racial disparity and read articles about race and sentencing, I encountered suggestions that racial disparity exists in Wisconsin prisons because convictions of crimes involving drugs fall more heavily on African Americans than on

Caucasians.<sup>7</sup> An implication was that, in order to reduce racial disparity in its prisons, Wisconsin should not prosecute drug abusers, even when they are selling drugs.<sup>8</sup>

In order to address the suggestion that racial disparity in Wisconsin prisons is caused by drug-offense convictions, I sought assistance from DOC because DOC keeps

statistics on the type of conviction that resulted in each inmate's incarceration. Those statistics show the gender and race of inmates and the category of the most serious crime for which inmates were incarcerated. DOC's report lists four conviction categories: violent offense, property offense, drug offense, and public-order offense. DOC provided a copy of its report that shows the number and percentage of inmates who fell into each of these four categories from June 30, 2000, through December 31, 2014.<sup>9</sup>

DOC's report shows that on December 31, 2014, only 934 of the 8,024 African-American men then incarcerated were confined with drug-related offenses as their most serious crime.<sup>10</sup> Stated otherwise, conviction of a

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more serious crime than a drug-related offense caused incarceration of 7,090 African-American men. This DOC report reflects a reduction of the number of African-American men whose incarcerations were caused by drug-offense convictions, with those convictions having peaked in 2004. However, while the number of drug-related convictions of African-American men that resulted in incarceration has fallen, the number of incarcerations of African-American men for violent crimes has risen. As of December 31, 2014, 73.2 percent of male African-American inmates were incarcerated in part because of convictions of violent crimes.<sup>11</sup>

Since it does not appear that racial disparities in imprisonment are simply a result of racial disparities in convictions for drug-related offenses, we focused more broadly on the role of race in sentencing. Our goal was to examine whether similarly situated African-American and Caucasian male defendants were sentenced similarly. Initially, we assumed that defendants were similarly situated when two legally relevant variables were similar: offense seriousness and record of prior convictions.<sup>12</sup>

It would have been ideal to compare defendants of different races who were charged with and convicted of exactly the same crimes and who also had exactly the same prior conviction histories. However, we could not obtain samples of a size sufficient for analyses that met those parameters because of the many crimes that form the bases for conviction (and thus incarceration) in Wisconsin prisons. Therefore, we decided to compare defendants who were convicted of the same class of felony and had similar conviction histories, again based on the class of felony for which they had been convicted. We used data from Milwaukee County because Milwaukee County provided the most data with regard to African-American defendants. ▶▶

## Priority for Courts: Don't Make Injustices Worse

by Pamela E. Oliver



The 2007 Wisconsin Sentencing Commission study, *Race & Sentencing in Wisconsin*, found what you might think of as probable cause to believe that whites were less likely to be sent to prison than blacks and Latinos, after controlling for both offense severity and several measures of prior record. Chief Justice Roggensack has worked for years to get better measures of criminal history and other relevant legal factors either to assure that there is no racial bias after proper controls or to ferret out the problems so that they can be fixed. I worked with her on this project briefly about six years ago, but did not solve the data problems. She kept working and has finally achieved common person-identifiers across DOC and CCAP, something that reports have been asking for since at least the late 1990s.

The chief justice's article here discusses why this enterprise is harder than it may seem on the surface, proposes a way of combining past convictions into one composite measure based on adding up the putative sentence lengths of prior convictions depending on felony class, and provides a preliminary report on racial patterns in pleading guilty or going to trial in some recent years in Milwaukee.

The Milwaukee analysis focuses on plea bargaining, because most sentences are results of plea bargains and sentencing disparities probably arise from these bargaining processes rather more than from overt judicial decisions. In Milwaukee, black people charged with felonies are less likely than white people to plead guilty and thus more likely to risk trial where, if they are found guilty, their sentences are likely to be longer. The data also show that, for Class C felonies, blacks are less likely to be found guilty in a trial. CCAP shows charges that are ultimately dismissed, permitting some study of plea bargains in future research. For example, although CCAP does not directly record custody status, this can be determined from coding the address field, and my own analysis of 2004 Dane County CCAP information suggests that pleading guilty to a less serious charge than the worst filed was more common for those not in custody when sentenced.

As the article suggests, the problem of "prior record" is the most difficult to solve. It is unlikely that either researchers or legal professionals will ever agree that any one composite measure captures everything about prior record that should be captured in sentencing. There is also a small but growing criticism of the practice of punishing people more harshly for a given offense based on their prior record.\* For one thing, the more intense policing in some communities (even if these practices are justified for crime-control reasons) has the effect of giving minority youth longer "records" of police contact and arrest than white suburban youths with exactly the same behavioral profiles. There is also a growing criticism of using "risk assessment" tools, for both juvenile and adult offenders, that can be shown to have racial bias.

I fully support Chief Justice Roggensack's efforts to improve our data so that we can monitor the judicial system better. But I would hope that the courts would also learn to think about how other systems impact what comes to their benches. Too often the criminal justice system amplifies and exacerbates inequality. The courts cannot cure inequality that arises in socioeconomic systems. But we can ask that they not make it worse.

*Pamela Oliver is professor of sociology at the University of Wisconsin–Madison.*

\* See, e.g., Nancy J. King, *Sentencing and Prior Convictions: The Past, the Future, and the End of the Prior-Conviction Exception to Apprendi*, 97 MARQ. L. REV. 523 (2014).

Because statistics operate on numbers, defining when defendants were similarly situated also required constructing a numerical offense-severity score and a numerical prior-conviction score for each defendant. We constructed a numerical value for each class of felony, A – I, and misdemeanor classes A – C, by establishing mathematical ratios for the maximum sentence for each felony and misdemeanor class and their relative weights, as set forth below:

**TABLE 1 (CLASS SEVERITY WEIGHTS)**

CLASS	MAXIMUM SENTENCE	WEIGHT
A felony	Life without release	20
B felony	60 years	15
C felony	40 years	10
D felony	25 years	6.25
E felony	15 years	3.75
F felony	12 years	3
G felony	10 years	2.5
H felony	6 years	1.5
I felony	3.5 years	.875
A misdemeanor	9 months	.1875
B misdemeanor	90 days	.0417
C misdemeanor	30 days	.0208

The above chart weights criminal convictions according to the maximum sentence length of each crime's class. For example, the maximum sentence for a Class B felony is to that for a Class H felony (60 years and 6 years, respectively) as the weight of a Class B felony is to that of a Class H felony (15 and 1.5, respectively). Stated otherwise, the maximum sentence for conviction of a Class B felony is 10 times the maximum sentence for a Class H felony; therefore, the weight used in our study for a Class B felony conviction is 10 times the weight used for a Class H felony conviction.<sup>13</sup>

By way of example, if a defendant had a current Class C conviction for which he was then incarcerated, his offense-severity score would be 10. If he also had two prior convictions, one for a Class C felony and one for a Class D felony, his prior-conviction score would be 16.25, the additive of the weights of the two felony classes (10 + 6.25).

Initially, it seemed that the offense-severity score and the prior-conviction score would be reasonably reliable tools to assist in determining when African-American

and Caucasian male convicted defendants were similarly situated. However, because most convictions result from pleas, wherein crimes initially charged could be modified prior to conviction, the severity scores provided less precise guidance than we would have liked.

To explain further, although pleas of guilty can occur without discussion with the prosecutor, the majority of pleas come about through bargaining between the prosecutor and the defense counsel. If charge bargaining occurs during the plea-bargaining process such that the charges initially filed are dismissed and read-in or simply reduced and if the initial charges cannot be determined, as may be the case with a negotiated issuance, the offense-severity score may not accurately represent the severity of the defendant's conduct.<sup>14</sup> However, the circuit court will know of the initial charges through parts of the record not evident from review of data that CCAP maintains, such as presentence investigative reports (PSI) or sentencing comments of counsel. Therefore, counts dismissed and read-in and amendments of the pleadings may affect the sentence given for reasons that may not be apparent. Furthermore, because plea-bargaining terms are by their very nature imprecise, varying from prosecutor to prosecutor and criminal charge to criminal charge, prior-conviction scores also could be affected by plea bargaining that occurred with earlier criminal prosecutions.

The concern that the crime of conviction may not represent the severity of the defendant's offense is not present with convictions that result from trials. There, offense-severity scores were reasonably reliable tools to begin comparing the sentences of African-American and Caucasian defendants who were sentenced subsequently to conviction at trial. However, because sentences after trial are affected by defendants' prior convictions, those sentences also could be affected by variables that occurred previously.

Furthermore, after discussions with many circuit court judges, we concluded that judges frequently sentence defendants who were convicted after jury trials more harshly than defendants convicted of the same crime following pleas. The reasons given were defendants' accepting responsibility and evidencing remorse when pleading, as well as facts developed at trial showing more blameworthiness on the part of defendants and more-specific effects of crimes on victims. Therefore, sentences of defendants with similar offense-severity scores who pleaded should be analyzed separately from sentences of those whose convictions resulted from trials.

In one very preliminary comparison of sentencing in Milwaukee County, we separated convictions of African-American and Caucasian male defendants into felony Classes A – I.<sup>15</sup> We asked questions of our data: (1) Do African-American men plead guilty at a different rate than Caucasian men; and (2) Given a “not guilty” plea, were African Americans found guilty at a different rate than Caucasian defendants in jury trials? Our data produced some interesting results that warrant further study.

First, we found that there are times when African Americans and Caucasians plead to the same class of felonies at different rates and sometimes those differences were statistically significant. A difference is statistically significant when it is probable that the difference in the data is caused by something other than random chance. As a standard statistical convention, a difference is statistically significant when the “p-value” is  $\leq 0.05$ .<sup>16</sup> Statistical significance depends not only on the percentage difference but also on the sample size. For example, getting 60 percent heads in 10 flips of a coin is not sufficient evidence that something other than random chance caused the results. But getting 60 percent heads in 1,000 flips would be sufficient evidence that the coin is biased toward coming up heads. The p-value assesses both the percentage difference in plea rates between African-American and Caucasian defendants and also whether there are enough cases to reach a statistically significant conclusion.

In Class B felonies, Caucasians were 2.55 percentage points more likely to plead guilty than were African Americans, but the difference is not statistically significant, with a p-value of 0.3328, which is not smaller than or equal to the p-value of 0.05 required for statistical significance. For Class C felonies, the rate of guilty pleas was higher for both African Americans and Caucasians, but in this case the difference of 4.40 percentage points is statistically significant.

**TABLE 2A (PLEAS)**

	GUILTY	NOT GUILTY	PERCENT GUILTY	P-VALUE
Felony Class B				
African American	841	259	76.45%	0.3328
Caucasian	316	84	79.00%	
Felony Class C				
African American	2,901	317	90.15%	$\leq 0.0001$
Caucasian	1,302	75	94.55%	

Second, when African-American men went to trial before a Milwaukee County jury on a Class C felony, they were found guilty 65.56 percent of the time. This is less frequently than Caucasian defendants, who were found guilty of Class C felonies 78.57 percent of the time.<sup>17</sup> This difference also is statistically significant. See the data below.

**TABLE 2B (JURY TRIALS)**

	GUILTY	NOT GUILTY	PERCENT GUILTY	P-VALUE
Felony Class C				
African American	198	104	65.56%	.0458
Caucasian	55	15	78.57%	

However, from the data that currently exist, it is not possible to determine why African-American men chose jury trials for Class C felonies. One cannot determine whether they did not get a plea offer they found acceptable, or whether they believed that they would not be found guilty by a Milwaukee County jury, or whether some other reason supported the choice. In any case, if it is true that judges sentence defendants to longer prison terms following convictions after a jury trial than those with convictions arising from pleas, it may be that those convicted by a jury received a longer sentence than if they had pleaded to the same Class C felony. In addition, it is likely that probation is ordered more frequently for defendants who are convicted based on a plea rather than after trial. Of course, those who were found not guilty at trial came out much better than those who pleaded.

Third, in regard to Class D felonies, again, African-American males pleaded guilty less frequently than Caucasian males, and that difference is statistically significant. By contrast, when not pleading, they were convicted by a jury at a rate similar to Caucasian defendants. See the following tables. ▶▶

**Sentencing should be transparent, so that all who examine it, either for an individual or for a group, will be able to see it is fair and evenhanded.**

**TABLE 3A (PLEAS)**

	GUILTY	NOT GUILTY	PERCENT GUILTY	P-VALUE
Felony Class D				
African American	1,802	145	92.55%	≤0.0001
Caucasian	806	31	96.30%	

**TABLE 3B (JURY TRIALS)**

	GUILTY	NOT GUILTY	PERCENT GUILTY	P-VALUE
Felony Class D				
African American	115	27	80.99%	1.0000
Caucasian	22	5	81.48%	

Fourth, in regard to Class E felonies, once again, African-American males pleaded guilty less frequently than Caucasian males, at a rate that is statistically significant. Jury trials, on the other hand, did not result in a statistically significant difference in the rate of conviction for African-American males when compared with Caucasian males. Similar results were seen in plea rates and trial-conviction rates for Class F felonies. See the tables below.

**TABLE 4A (PLEAS)**

	GUILTY	NOT GUILTY	PERCENT GUILTY	P-VALUE
Felony Class E				
African American	2,969	209	93.42%	≤0.0001
Caucasian	1,113	36	96.87%	
Felony Class F				
African American	2,651	158	94.38%	≤0.0001
Caucasian	905	22	97.63%	

**TABLE 4B (JURY TRIALS)**

	GUILTY	NOT GUILTY	PERCENT GUILTY	P-VALUE
Felony Class E				
African American	134	62	68.37%	0.5403
Caucasian	25	8	75.76%	
Felony Class F				
African American	105	43	70.95%	1.0000
Caucasian	15	6	71.43%	



Why is a difference in rates of pleading of concern when studying race and sentencing?<sup>18</sup> It is of concern because for felonies in Classes C, D, E, and F, African-American males, *as a group*, could be getting, on average, longer sentences from judges who tend to sentence those who are convicted after jury trials to longer terms of imprisonment than those who plead, and *as a group*, they could be getting probation less frequently, given the lower plea rate. Therefore, even though data as currently entered in CCAP are not sufficient to test whether similarly situated African-American and Caucasian males are sentenced to statistically significant different terms of imprisonment, and our study of pleading frequency is very preliminary, the differences in pleading frequency could have a racial impact on African Americans as a group because they plead guilty less frequently.

Sentencing should be transparent, so that all who examine it, either for an individual or for a group, will be able to see it is fair and evenhanded. CCAP's database is a necessary component to any statistical determination of whether sentencing practices have contributed to racial disparity in Wisconsin's prison population. Some of the data that CCAP currently stores are necessary to considering race and sentencing, but they are not sufficient to answer the question I posed: whether similarly situated African-American and Caucasian males are sentenced similarly. ▶▶

## Statistical Complexity Shouldn't Slow Pursuit of Justice

by Joe Donald

The general problem is clear: Wisconsin has the highest percentage of incarcerated black men in the nation. In Milwaukee County, more than half of African-American men in their 30s have served time in prison.<sup>1</sup>

Here is some of my own background: As a trial court judge in Milwaukee County for 20 years, I have handled thousands of criminal cases where I imposed sentences on guilty defendants. I have also presided over both types of drug courts: the drug treatment court, which addresses underlying issues of addiction as opposed to just imposing confinement, and the drug court calendar, which handles all types of drug-related offenses, such as possessing, manufacturing, and delivering drugs. Besides my work, I have further insight into the criminal justice system from a family member who has worked as a police officer—and from other family members who have been stopped, arrested, prosecuted, or incarcerated.

In short, I am greatly interested in any examination whether there is a disproportionate number of African-American men in Wisconsin's prisons due to a racial bias in Wisconsin courts—and in continuing the discussion.

So I would like to begin by commending Chief Justice Patience Drake Roggensack for initiating this discussion on racial disparity in Wisconsin's prisons. I also would like to applaud her for promoting the development of a state ID (or SID), which would help others continue this research by making it easier to identify appropriate cases for future statistical analysis. Finally, I am grateful the justice welcomes others to continue this study.

The chief justice's study is very timely. In cities across our nation, people are protesting racial biases and injustices. Although these injustices have existed for generations, cell phone cameras and social media have made some of today's most egregious injustices accessible for all to see.

In many ways, today's unrest is a continuation of the 1960s civil rights movement. Justice is still not granted equally to all Americans, and those who experience or witness injustices have a legitimate right to protest.

Our nation and our criminal justice system can no longer turn a blind eye to racial biases. Nor can we conclude that they do not exist simply because we lack the "statistical methodology" to study such large and complex issues.

Unfortunately, it appears Chief Justice Roggensack's study has done just that. Despite enumerating the many limitations that she and her staff encountered while conducting their research and analysis, she concludes that

African-American males are not disproportionately represented in Wisconsin prisons because of drug-offense convictions.



I find this conclusion troubling and hard to accept, especially considering that the study itself admits lacking the necessary staff, data, and resources to perform a complete statistical analysis. At best, the conclusion is premature.

I also have trouble with the methodology where the study classifies Caucasians and African Americans using an "offense-severity score" and a "prior-conviction score" to perform a numerical analysis. In my opinion, this methodology is like comparing apples to oranges; it simply does not allow for an accurate analysis.

Furthermore, the study fails to evaluate whether judges have implicit biases when imposing their sentences. Human brains are programmed to make sense of the world by fitting information into categories. It's only natural for judges, like everyone else, to categorize individuals by their ethnicity and past experiences with similar people.

If we are to move forward in addressing the racial disparity in Wisconsin prisons, judges must first learn to recognize their own racial biases. Studies show that becoming aware of a racial bias is the first step in reducing the problem in that it allows people to develop strategies to account for it.<sup>2</sup>

We must also work harder to refine the methodology used in studying racial bias in Wisconsin's criminal justice system. To do so, future studies must have the right data and ask the right questions.

If anything, Chief Justice Roggensack's study illustrates the enormity of the task of trying to assess all the variables that go into sentencing. Although I see flaws in the study, it is an important step in creating a more just and equitable criminal justice system.

*Joe Donald, L'88, is a judge of the Milwaukee County Circuit Court.*

<sup>1</sup> *Project Milwaukee: Black Men in Prison*, a series of WUWM and MPTV, reports on these matters: <http://wuwmm.com/topic/project-milwaukee-black-men-prison#stream/0> (visited Sept. 4, 2016).

<sup>2</sup> A summary and links to the studies can be found at <http://www.brookings.edu/research/papers/2014/02/awareness-reduces-racial-bias-wolfers> (visited Sept. 4, 2016).

Were all the necessary data available, we would have conducted multiple linear regression analyses to answer whether similarly situated African-American and Caucasian men are sentenced similarly. In order to permit analysis of sentencing data using statistically proven functions, CCAP should collect and report the data as described below.

To explain further: To enable statistical analyses of sentencing on an individual basis and on a group basis, such as by race, data entry in CCAP's system must be modified so that it contains the values necessary for mathematical comparisons of the various components of sentencing. In furtherance of transparency in sentencing, each entry for a convicted defendant should begin with the defendant's SID.<sup>19</sup> The defendant's gender and race, as self-reported, should be entered. Each *charge* filed should be entered indicating the severity class, e.g., felonies A – I and misdemeanors A – C, and also the specific statute alleged to have been violated.<sup>20</sup> The disposition of each charge should be listed as dismissed, read-in, not guilty, or guilty. Each *conviction* should be listed separately by class and by the specific statute violated. It would be very helpful to comparing race and sentencing if severity weights were programmed by CCAP so that when a charge or conviction class is entered, the severity weight for the charge and the conviction class are generated automatically.<sup>21</sup> Whether the conviction arose from a plea or following trial

should be entered. Past convictions should remain available for each defendant by reference to SID. Other data would be helpful as well: e.g., the prosecutor's sentencing recommendation, whether a PSI was done and if so what the sentence recommendation was, and whether defendant had retained or appointed counsel.

**Perhaps the next person or group who attempts to statistically analyze race and sentencing will come up with a statistical model to assess all components of sentencing.**

Convicted defendants receive probation—with sentence imposed and stayed or with sentence withheld—fine, jail, or a term of imprisonment. Each applicable alternative is entered at sentencing. Imprisonment includes a period of incarceration and a period of extended supervision. Both parts of the sentence should be entered, as well as whether the period of incarceration followed revocation

of probation. Sentences should be entered in terms of the number of days, as that is the unit of measure DOC employs. Employing the same unit of measure in CCAP's and DOC's databases will facilitate tracking and comparing individuals from conviction through DOC's custody.

When a defendant is convicted of multiple charges, the term of imprisonment is affected by whether the sentences for multiple convictions entered at the same time are concurrent with or consecutive to each other. Information detailing the conditions of each sentence often is contained in CCAP's "sentencing text." However, due to a lack of resources, we did not establish how to address this sentencing concern to be sure that it is racially neutral. One could examine only those sentences that were concurrent, but then it would be only the most serious crime of conviction that would be measured.

It is not possible to incorporate sentencing text into a statistical model without assigning numbers to the stated conditions. Sentencing conditions vary significantly, which due to the total lack of resources currently available to study race and sentencing in Wisconsin resulted in our not developing a uniform system for evaluating all sentencing conditions. Perhaps the next person or group who attempts to statistically analyze race and sentencing will come up with a statistical model to assess all components of sentencing.

Although I am disappointed by our inability to make a definitive statement about what role, if any, race plays in sentencing in Wisconsin, the problems we encountered are not unique to our study.<sup>22</sup> However, our efforts will not have been without effect if others, who have the resources and staff necessary, continue our study to assure that race plays no role in sentencing. We have enabled the continued study of race and sentencing in Wisconsin through CCAP's adoption of SIDs; by the creation of mathematically proportional severity weights for felony and misdemeanor classes set out in the chart above; with initial research showing that for felony classes C, D, E, and F, African Americans may be pleading guilty less frequently at a rate that is statistically significant; and by demonstrating that African-American males are not disproportionately represented in Wisconsin's prisons *chiefly* because of drug-offense convictions.

Race and sentencing in Wisconsin criminal courts is a serious topic worthy of further study with statistically reliable methods, so that emotional responses are set aside and rationality prevails. It is my hope that this writing will encourage and enable further statistical study of whether similarly situated African-American and Caucasian defendants are sentenced similarly. ■

<sup>1</sup> Racial disparity in incarceration occurs when the percentage of a racial group incarcerated is significantly disproportionate to the racial group's representation in the population. In Wisconsin prisons, as of December 31, 2014, 42 percent of the incarcerated males and 24 percent of the incarcerated females identify themselves as African American. According to the last census data, 6.5 percent of the state's population identified as being solely African American; however, biracial men and women often identify themselves as African American, and persons from other states are present in Wisconsin prisons.

<sup>2</sup> While we focused only on comparing African-American and Caucasian males, there is a growing Latino population in Wisconsin prisons. Therefore, ethnicity may become a concern, with the concomitant need to examine fairness in Wisconsin courts to those who have Latino backgrounds. *Cf.* Kenneth E. Fernandez & Timothy Bowman, *Race, Political Institutions, and Criminal Justice: An Examination of the Sentencing of Latino Offenders*, 36 COLUM. HUM. RTS. L. REV. 41 (2004).

<sup>3</sup> As we progressed, we limited the study to incarcerated men because women are incarcerated at a much lower rate than men. Therefore, including incarcerated women would have complicated our task of attempting to isolate whether race affected sentencing.

<sup>4</sup> Attorneys Andrew Hebl, Amy MacArdy, Jennifer Beach, Gabe Johnson-Karp, Megan Stelljes, Rachel Zander, and Cody Brookhouser, all of whom were my law clerks over the years that this study was my "summer project," provided invaluable assistance and suggestions. I am grateful for their thoughtful advice, support, and encouragement. Nicholas Keuler, of the University of Wisconsin–Madison, provided statistical support and guidance. I speak only for myself in this essay.

<sup>5</sup> CCAP's staff members were very helpful. They were committed to assisting appropriately our attempt to analyze whether sentences imposed upon conviction were affected by the race of defendants. Our court system benefits in so many ways from their skill and dedication. Yet, as the article explains, additional CCAP programming in regard to data collection is necessary if we are to make sentencing transparent and available for meaningful review through CCAP.

<sup>6</sup> As I understand it, efforts were made to coordinate the SID with the defendant's fingerprints as well.

<sup>7</sup> It may be noted that there are crimes for which Caucasians are convicted much more frequently than are African Americans. For example, in regard to men who are convicted of driving while intoxicated, 83 percent are Caucasians and only 6 percent are African Americans.

<sup>8</sup> See, e.g., Steven Elbow, *Going After the Gap*, CAP TIMES (Madison, Wis.), June 16–22, 2010, at 8.

<sup>9</sup> See JOSEPH R. TATAR II, WISCONSIN DEPARTMENT OF CORRECTIONS, PRISON INMATE PROFILE: MOST SERIOUS OFFENSE BY RACE AND GENDER (2000–2014) (July 2015).

<sup>10</sup> On December 31, 2014, 752 of 10,219 Caucasian male inmates were incarcerated for drug-related convictions. *Id.*, Table 5.

<sup>11</sup> The percentage of incarcerated Caucasian males who have a conviction of a violent offense also has grown, from 59.6 percent on December 31, 2004, to 65.5 percent on December 31, 2014. *Id.*, Table 4.

<sup>12</sup> In *State v. Gallion*, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197, the Wisconsin Supreme Court thoroughly discussed legally relevant variables that a circuit court judge could consider when sentencing a defendant convicted of a crime to which Truth-in-Sentencing applies. However, neither database contained all the sentencing variables that *Gallion* identifies as legally relevant.

<sup>13</sup> Because the Wisconsin statutes do not contain a chart that lists each statute that falls into each felony and misdemeanor class, I have created such a chart as an appendix; it is available online at <http://perma.cc/KH2A-HB78>.

<sup>14</sup> Charge bargaining may occur during plea bargaining, when some of the counts charged are dismissed, when the charge of conviction was agreed upon and the criminal complaint or information was amended to allege a new charge that replaced the charges initially filed, or when a negotiated issuance of a criminal complaint occurs.

<sup>15</sup> This study is very preliminary because of the way in which data are currently maintained and the resulting inability to correct for individual variations that may affect why defendants choose to plead. However, as the article explains, because of its potential significance, the matter should be pursued further.

<sup>16</sup> The p-value is the probability that the difference observed was due to random chance.

<sup>17</sup> Some defendants who did not plead guilty elected bench trials rather than jury trials.

<sup>18</sup> The connection between race and pleading guilty has been studied in Pennsylvania. See Celesta A. Albonetti, *Race and the Probability of Pleading Guilty*, 6 J. QUANTITATIVE CRIMINOLOGY 315 (1990). The data Albonetti reviewed also suggest that "defendants who plead guilty, compared to those who pursue a trial, receive less severe sentences." *Id.* at 315.

<sup>19</sup> CCAP currently enters the same SID as DOC. This is a benefit that has resulted, in part, from our study.

<sup>20</sup> CCAP currently enters the statute and class of conviction.

<sup>21</sup> Further CCAP programming is needed for CCAP to generate combined severity weights for prior convictions without further manual data entry. This task also could be accomplished if one had the resources necessary to create a program that upon entry of the CCAP data calculations would be done without further data entry. We did not have those resources.

<sup>22</sup> A 2007 study, which considered only five types of criminal offenses, concluded, "More and better data regarding race and sentencing in Wisconsin is necessary before we can gain a better understanding of the role race may or may not play in sentencing decisions." BRENDA R. MAYRACK, WISCONSIN SENTENCING COMMISSION, RACE & SENTENCING IN WISCONSIN: SENTENCE AND OFFENDER CHARACTERISTICS ACROSS FIVE CRIMINAL OFFENSE AREAS (August 2007).

## COMMENT

## Looking Beyond the Streetlamp's Glow

By Michael M. O'Hear

There is no question that Wisconsin's prisons reflect massive racial disparities in incarceration. More than 40 percent of the state's prisoners, but only 6.6 percent of its residents, are black.<sup>1</sup> Indeed, one recent study found that Wisconsin has the nation's highest rate of black male incarceration.<sup>2</sup> The important and uncertain empirical questions are not whether a disparity exists, but (1) whether the disparity is unwarranted—that is, unjustified by reference to any legitimate, race-neutral reasons—and (2) assuming the disparity is at least to some extent unwarranted, what actors in the criminal justice system are responsible for it.

These are not new questions. Researchers have grappled with them for decades, both in Wisconsin and nationally. From the start, however, such efforts have been plagued by limitations in the available data.

Research in this area recalls the old joke about a man looking intently for a lost quarter in the light of a streetlamp at night. A passerby inquires where the quarter was dropped. The man replies, "Down the block, but I'm looking here because the light is better."

Similarly, researchers have been drawn to study disparity where the light is best—that is, at the sentencing stage. The sentencing decision is a public one, and becomes part of a permanent case record that also includes the offense of conviction and various other data points. Collecting such data from thousands of cases, researchers can perform multivariate regression analysis to determine which variables correlate with longer sentences, holding all other variables constant.

For instance, in what was probably the earliest systematic study of sentencing disparities in Wisconsin, researchers supported by the Wisconsin Supreme Court's Office of Court Operations gathered data on 2,417 felony defendants who had been sentenced between the start of 1977 and the middle of 1980.<sup>3</sup> They broke out their results by offense type. By way of illustration, they found that sentence length in armed

robbery cases correlated in a statistically significant way with ten variables.<sup>4</sup> Those with the greatest effect on sentence length were the following: number of serious charges in the particular case, whether the defendant went to trial, whether the defendant had a prior conviction for a violent crime, whether the defendant had an alcohol problem, and the defendant's race. Holding all other measured variables constant, a non-white armed robber could expect to receive a sentence that was 409 days longer than a white armed robber.<sup>5</sup>

One might be inclined to conclude that a number of Wisconsin's sentencing judges in the late 1970s were racially biased. However, while the researchers tracked 142 variables, they were still unable to account for most of the case-to-case variation in sentence lengths.<sup>6</sup> Additional, unmeasured variables were obviously playing a big role in driving armed robbery sentences, and it is possible that if researchers could hold some of those other variables constant, the race effect would wash out.

On the other hand, the regression analysis might well understate the true level of racial bias in the system, for it simply accepted as a given many variables that resulted from the system's operation. For instance, as important as race was in the analysis, going to trial was even more important. Holding race, criminal history, and all of the other measured variables constant, the armed robber who went to trial could expect a prison sentence 591 days longer than the armed robber who pleaded guilty. However, whether a defendant pleads guilty or not is largely a function of the plea-bargaining behavior of prosecutors and defense counsel. If that behavior differed based on the defendant's race—e.g., if prosecutors were less inclined to offer generous plea bargains to black defendants—then it is conceivable that bias at the plea-bargaining stage played a much more important role in driving the system's overall racial disparities than did any judicial bias at the sentencing stage.



This gets us back to the problem of only looking where the light is best. Unfortunately, in Wisconsin and the United States as a whole, police and prosecutorial decision making tends to be a black box. Yet judicial decision making cannot be fully assessed without understanding what happens at the earlier stages in the process.

Chief Justice Patience Roggensack's paper should be welcomed as an effort to focus attention on one part of the process that has traditionally rested outside the streetlamp's light. She finds statistically significant differences in the guilty-plea rates of blacks and whites convicted of similar offenses in Milwaukee County. This is an intriguing finding, although she properly recognizes that it can only be reported as a matter warranting further research. Before one could fairly criticize the plea-bargaining process in Milwaukee, one would need much more data, in order to control for many more variables. This work would be facilitated by the much-belated creation of a single identifying number for defendants across all major criminal justice agencies in Wisconsin, which, happily, Chief Justice Roggensack reports is in the works. The streetlamp's reach may be growing.

Yet, as fascinating as all of this empirical work is, the goal of definitively proving and quantifying a pure race effect in punishment will likely continue to be frustratingly elusive. There are simply too many variables at play, many of which defy easy, reliable measurement and many others of which are themselves socially constructed in ways that may reflect bias (like going to trial). Perhaps we are focusing too much attention on the quixotic goal of pinning down the cause of racial disparity in our prison population. It should not distract us from the pressing imperative—in Wisconsin and nationally—of reducing our bloated and historically unprecedented incarceration rate.<sup>7</sup>

*Michael O'Hear is professor of law at Marquette University.*

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<sup>1</sup> CHRISTINA D. CARMICHAEL, WIS. LEG. FISCAL BUREAU, INFORMATIONAL PAPER 55: ADULT CORRECTIONS PROGRAM 13 (2015); U.S. Census Bureau, Quick Facts: Wisconsin, <https://www.census.gov/quickfacts/table/RHI225215/55,00> (visited Sept. 4, 2016).

<sup>2</sup> JOHN PAWASARAT & LOIS M. QUINN, UNIVERSITY OF WISCONSIN—MILWAUKEE, WISCONSIN'S MASS INCARCERATION OF AFRICAN AMERICAN MALES: WORKFORCE CHALLENGES FOR 2013, at 2 (2013).

<sup>3</sup> SANDRA SHANE-DUBOW ET AL., WISCONSIN SENTENCING GUIDELINES: PHASE I AND III OF RESEARCH AND DEVELOPMENT 145 (1982).

<sup>4</sup> *Id.* at 157. Statistical significance here means that the chance that the reported correlation resulted from random variation was less than 5 percent.

<sup>5</sup> I refer here to nominal prison sentences. At that time, Wisconsin's Parole Board had the authority to release most prisoners well before the completion of the full nominal sentence.

<sup>6</sup> *Id.* at 141, 164. The researchers' initial model accounted for only 28 percent of the variance. When judge identity was added to the model, the  $R^2$  rose to 0.39. In the final model (judge identity included), the race effect diminished somewhat, but remained statistically significant. *Id.* at 174.

<sup>7</sup> As I detail in a forthcoming book, there are many reasons to think that Wisconsin's current incarceration rate might be sharply reduced without any adverse effect on public safety. MICHAEL O'HEAR, WISCONSIN SENTENCING IN THE TOUGH-ON-CRIME ERA: HOW JUDGES RETAINED POWER AND WHY MASS INCARCERATION HAPPENED ANYWAY ch. 6 (2017).